UNITED STATES of America,
Plaintiff-Appellee,

v.

Kenneth Richard INNELLA,
Defendant-Appellant.

No. 82-8218
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Nov. 1, 1982.

Defendant was convicted in the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., Chief Judge, of conspiracy to possess with intent to distribute cocaine and attempting to possess with intent to distribute cocaine, and he appealed. The Court of Appeals, Godbold, Chief Judge, held that: (1) trial court did not abuse its discretion in denying continuance; (2) issue of whether defendant's trial counsel was ineffective could not be decided in instant appeal; and (3) defendant's objective acts were unequivocal thus supporting his conviction for attempt.

Affirmed.

Synopses, Syllabi and Key Number Classification

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

1. Criminal Law -- 614(1)

Trial court did not abuse its discretion in denying continuance where defendant's counsel had been granted two continuances on medical grounds, where on date of trial defendant sought continuance to secure new counsel, and where putative new counsel notified court he could not attend trial for several weeks.

2. Criminal Law -- 1128(2)

Issue of whether defendant's trial counsel was ineffective could not be decided in instant appeal because many of the factual allegations set out in defendant's brief concerning trial counsel involved matters not of record.

3. Criminal Law -- 44

To be convicted of attempt the defendant's objective actions, taken as a whole, must strongly corroborate the required culpability.

4. Drugs and Narcotics -- 123

Defendant's words and actions were consistent with attempt to purchase a controlled substance, and thus his objective acts were unequivocal and supported his conviction for attempting to possess with intent to distribute cocaine; actions or

intentions of undercover agent, which defendant contended made his conduct equivocal, were not a relevant reflection of his underlying intent.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

GODBOLD, Chief Judge:

Appellant was convicted of conspiracy to possess with intent to distribute cocaine and for attempting to possess with intent to distribute cocaine.

[1] Defendant's counsel was granted two continuances on medical grounds. On the date of the trial, February 17, 1982, defendant sought a continuance to secure new counsel. The court consented provided that the trial not be delayed, but the putative new counsel, from New Jersey, notified the court that he could not attend a trial until March 1. The court then denied a continuance. In these circumstances the court did not abuse its discretion.

[2] Appellant contends that his trial counsel was ineffective. This issue cannot be decided in this appeal because many of the

factual allegations set out in appellant's brief concerning trial counsel involve matters that are not of record. These serious charges, not supported by any evidence in this record, are inappropriately made. Trial counsel has had no means or opportunity to respond to them, and no determination has been made of whether the charges have even a glimmer of merit. If appellant wishes to raise an ineffective counsel issue 28 U.S.C. § 2255 is available to him.

[3,4] With respect to the attempt count, the defense of impossibility, asserted in reliance on U.S. v. Oviedo, 525 F.2d 881 (5th Cir. 1976) is of no help to appellant. Oviedo focused on the objective acts of the defendant.

> W]e demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law.

Id. at 885. The court in Oviedo distinguished U.S. v. Mandujano, 499 F.2d 370 (5th Cir. 1974). In Mandujano the defendant

negotiated a sale of heroin with an undercover agent. After taking the agent's money the defendant was unable to locate his source. He then returned the money to the agent. The defendant was convicted of attempted distribution and the Fifth Circuit affirmed. In distinguishing Mandujano the Oviedo court stressed that Mandujano's acts were unequivocal: he accepted the money and stated that he would purchase heroin with that money. In contrast, Oviedo's objective acts were inconsistent: he stated he would sell heroin but then sold an uncontrolled substance. In sum, to be convicted of attempt the defendant's objective actions, taken as a whole, must strongly corroborate the required culpability.

In the present case Innella's objective acts were unequivocal. His words and actions were consistent with an attempt to purchase a controlled substance. Innella argues that the actions or intentions of the undercover agent were inconsistent with a criminal enterprise, and, therefore, the objective basis required to convict him of attempt was not present. Oviedo focuses on the objective acts of the accused. The act which Innella claims makes his conduct equivocal was an act of a government agent

and thus not a relevant reflection of his underlying intent. See U.S. v. Korn, 557 F.2d 1089 (5th Cir. 1977).

AFFIRMED.

Adm. Office, U.S. Courts - West Publishing Company, Saint Paul, Minn.

UNITED STATES COURT OF APPEALS
Eleventh Judicial Circuit

John C. Godbold
Chief Judge
Post Office Box 1589
Montgomery AL 36102

November 24, 1982

Mr. John J. Pribish
Attorney at Law
850 U.S. Highway No. 1
No. Brunswick, NJ 08902

RE: U.S. v. Innella
82-8218

Dear Mr. Pribish:

I am directing the clerk of this court to return to you the petition for rehearing/ rehearing en banc received by the clerk November 22, 1982. It will not be accepted for filing.

Your zeal has outrun your sense of propriety and a decent regard for the character and reputation of another lawyer.

Your petition repeatedly states that trial counsel committed a falsehood and committed the crime of subornation of perjury. These matters are recited as facts as though judicially established or as though uncontroverted and uncontrovertible. Your statements are not facts but are only contentions made by you and, obviously, originating in statements made by your client to you of

events that he says occurred. Your statements have not been determined by any court to be true or false, have not been presented to any court that could establish whether they are true or false, and are not matters of record.

If you want to make these serious charges against another lawyer you can make them in a § 2255 hearing in the district court where they can be made in a proper manner. Your client can then testify under oath and subject to the penalties of perjury concerning what he says occurred. The attorney whose integrity you have attacked can have an opportunity to appear and to give his version.

You have the right to seek a rehearing/-rehearing en banc with respect to paragraph 2 of the court's opinion. But this court will not permit you to do so by defaming a trial attorney through stating as facts matters that at this juncture are nothing more than contentions.

You may file a proper petition within 15 days from date if you wish.

Sincerely yours,

/s/

John C. Godbold
Chief Judge

JCG:mbl

December 8, 1982

Honorable John C. Godbold
Chief Judge
United states Court of Appeals
Post Office Box 1589
Montgomery, AL 36102

Re: U.S. v. Innella
Docket No. 82-8218

Dear Judge Godbold:

I am in receipt of your Honor's letter dated November 24, 1982, which I received November 29, 1982. If the spirit of His Honor's letter was to save me some unperceived embarrassment, then I apologize. But, if, as I sense, the spirit of the letter was to admonish me, then I am highly offended.

At the outset, let me emphasize that I am as sensitive as His Honor with respect to the issue of examining another lawyer's competence and integrity in the handling of a criminal matter. I have been Chief Trial Counsel and Supervising Assistant Prosecutor of a Prosecutor's Office in New Jersey, and this has had a callousing effect on me when information regarding a lawyer's conduct is presented to me by a defendant. However, when that information, to wit: the client was instructed by counsel to take the stand and tell a concocted story, is corrobated by two (2) independent witnesses -- one of whom is a former D.E.A. Agent - then

it is incumbent upon counsel to bring that information to the attention of the court to prevent a miscarriage of justice.

Moreover, my sense of zeal is founded in the belief that a defendant in a criminal proceeding is entitled to receive, and the attorney is obligated to give, representation that reflects the highest principles of the bar. In this conviction, my sense of propriety is a commitment to the prevention of a miscarriage of justice - a lawyer who allegedly proposes to a client to tell the jury a concocted story defames himself as well as the administration of justice. Concommitantly, the decent regard for the character and reputation of another attorney must never be so ironclad that it prevents judicial and/or lawyer scrutiny. Here, trial counsel's alleged action impugned the system which was designed to protect the Defendant and his Constitutional rights.

When the aforesaid information was received, and corroborated, an attempt was made at the time of my engagement to seek an adjournment at the trial level in order to file the appropriate motion. This application was denied at sentencing. Thereafter, there were two alternative courses to pursue. One (the course which was pursued here), to file the affidavits in the Appellate proceeding, seek oral argument and

ask for a remand. The other course was a collateral attack by way of 28 U.S.C. 2255. In this regard, I am not unmindful that there appears to be a split of authority as to procedure. Compare United States v. Goodwin 446 F.2d 894 (9 Cir. 1971) with United States v. Lucas 513 F.2d 509 (Cir. 1973).*

* In United States v. Goodwin, supra, the court in Defendant's application for reversal based upon inadequate counsel stated: "the record on direct appeal provides no basis for ruling on his conclusionary allegations . . . there is nothing in the record to indicate that his representation by ( ) counsel was so gross on its face as to amount to a denial of due process. If there are facts outside the record which would support appellant's allegations, they must be presented in an application under 28 U.S.C. §2255." 446 F.2d at 895. On the other hand, in United States v. Decoster, 624 F.2d 196 (1976), the court sua sponte remanded the matter to the trial court for a hearing regarding the effectiveness of Defendant's trial counsel -- the Defendant did not raise the issue and it was not apparent in the record. See 624 F.2d at p217. In United States v. Lucas, supra after oral argument but prior to disposition, the court was informed the Defendant's trial counsel was not a member of the bar where the trial took place. The court remanded the matter to the trial court to conduct hearings and complete the record with respect to that issue. The court further noted, in a footnote at p512 that:

"7. Some of the cases in which this court has remanded the record to allow further trial court exploration of the

In view of the foregoing, I wouldurge that His Honor reconsider His remarks and re-examine the Appellant's Reply Brief and Suggestion For ReHearing En Banc. Contrary to the implication raised in His Honor's letter, the information concerning trial counsel's statements has been sworn to in affidavits based upon personal knowledge. Concededly these sworn statements raise serious issues regarding the character and conduct of trial counsel, but they also bear just as heavily on the issue raised by the Defendant that he was denied effective representation. Moreover, the thrust of the Suggestion is based not on these statements and affidavits, but rather trial counsel's statement on the record. Taking his statement at face value and assuming

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ineffectiveness issue include De-Coster, supra; United States v. Hurt, 72-2229 (remanded April 22, 1974); United States v. Simpson, D.C.Cir. 495 F.2d 1076 (remanded April 26, 1974). As in the instant case, these remand proceedings have on occasion led the trial judge to find that trial counsel was ineffective and that a new trial was indeed warranted. See, e.g. United States v. Simpson, supra."

counsel acted n good faith, reversal is nevertheless mandated. Accordingly, I respectfully request that your Honor rescind His instruction to the Clerk of the Court and permit the Defendant to formally file the Suggestion for ReHearing En Banc as previously framed.

I await His Honor's advice.

Respectfully Submitted,

/s/

JOHN J. PRIBISH

JJP:JS
~~Enclosure~~
cc: Craig Gillen

UNITED STATES COURT OF APPEALS
Eleventh Judicial Circuit

John C. Godbold
Chief Judge
Post Office Box 1589
MOntgomery, AL 36102

December 13, 1982

Mr. John J. Pribish
Counsellor at Law
850 U.S. Highway 1
North Brunswick, N.J. 08902

Re: U.S. v.Innella, 82-8218

Dear Mr. Pribish:

In your opening brief in this case (p.14) you said:

> That is, counsel attempted to fabricate a defense and sought to compel APPELLANTS'S cooperation by having APPELLANT testify falsely.

Nothing in the record supported this unqualified statement by you.

In its brief (p. 9), the government said:

> Claims of inadequate representation cannot be determined on direct appeal when such claims were not raised before the trial court and there has been not [sic] opportunity to develop and include in the record evidence bearing on the merits of the allegation. (Citations)

You then filed a reply brief in which you said (p. 11):

> It was, of course, trial counsel who wanted APPELLANT to take the stand and lie and APPELLANT who could not bear to do so.

You purported to "file" with the court as a "supplemental appendix" ex parte affidavits dated after the date of the government's brief and a day or two before your reply brief was filed. There is no authority under the rules and procedures of this court for expanding the record in this fashion, and had you filed a motion for leave to file the affidavits it would have been summarily denied.

In its opinion the court treated gently your incorrect procedural effort to expand the record. Rather it pointed out that you were inappropriately asserting matters orf the record and that accused trial counsel had no opportunity to respond to the outside-the-record allegations made nor had any determination been made of whether the charges had "even a glimmer of merit." We pointed out to you the availability of § 2255.

On petition for rehearing en banc, you reiterated your statements that trial counsel asked the appellant to take the stand and lie and that defendant was entitled to discharge trial counsel because counsel had attempted to have defendant take the stand and perjure himself. Your statements in the petition, like those in earlier briefs, were not qualified as allegations or contentions

but were recited as facts as though judicially established or as though uncontroverted and uncontrovertable. Whatever the truth of what occurred, trial counsel, accused by you of wrongdoing including subornation of perjury, has rights too -- to have the issue of his conduct raised in a context in which he may be present, may deny your allegations, offer contrary evidence, and subject his accusers to cross examination. Until that time you have no right to refer to your allegations against him as facts. It is only in your letter of December 8 that you recede to characterizing what you have said as "allegations."

It is puzzling that, after this court in its opinion pointed out to you the inappropriateness of what you had done, there would be a repetition in your petition for rehearing en banc.

This court has not suggested that you should not zealously pursue your client's interest even though the actions of another attorney may be involved. We spend a great deal of our time handling ineffective counsel cases. Rather we have said, and reiterate, that the manner in which you attempted ex parte to expand the record in this case, and the references to counsel's conduct as matters of fact rather than alle-

gations or inference, were inappropriate and were unfair to the person involved. We would have the same view were he not a lawyer.

Treating your letter as a petition for reconsideration, it is DENIED.

If you wish to file an appropriate petition for rehearing/rehearing en banc, you are allowed 15 days in which to do so. There will be no extension.

Sincerely,

/s/

John C. Godbold
Chief Judge

JCG:jb

UNITED STATES COURT OF APPEALS
Eleventh Circuit
Office of the Clerk

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Clerk

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56 Forsyth St. N.W.
Atlanta, Georgia 30303

Mr. John J. Pribish
Attorney at Law
850 U.S. Highway No. 1
North Brunswick, New Jersey 08902

No. 82-8218 U.S.A. v. INNELLA

Dear Counsel:

In accordance with this court's directive on November 24, 1982, I am returning to you unfiled your copies of the petition for rehearing en banc received in this office on November 22, 1982.

Sincerely,

NORMAN E. ZOLLER, CLERK

By /s/
Shelda V.Harris
Case Manager

SVH:ss

Enclosure

cc: Mr. Craig Gillen, Assistant U.S. Attorney - Atlanta